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# Labour Law in Post-democratic and Post-liberal Societies: A Case of Cognitive Dissonance

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# **LABOUR LAW IN POST-DEMOCRATIC AND POST-LIBERAL SOCIETIES: A CASE OF COGNITIVE DISSONANCE**

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York University, Toronto**

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Recently I contributed to a volume on the philosophical foundations of labour law. Most contributors located our subject within the discourse of liberal democracy, using terms such as “distributive justice”, “non-exploitation”, “dignity”, “citizenship”, and “social inclusion”. If you have a good memory, you’ll recall that such terminology once commanded respect amongst intellectuals and policy makers, that they were endorsed across the political spectrum, that they enjoyed widespread, if not deep, public support, that they even inspired practical public policies. If you have a good memory you’ll remember all that.

However, the concepts that once inspired labour law and conferred legitimacy on it have fallen into disrepute. We now appear to be entering a post-enlightenment, post-liberal, post-democratic, era. Governments, politicians and opinion-makers feel no compunction about denouncing freedom of expression and association, about ignoring the rule of law or the principle of equal protection. And an astonishing percentage of ordinary citizens — including many union members — seemingly acquiesce in or actively support the advent of illiberal democracy. This development poses serious problems for labour lawyers.

- First, they must find new justifications, build new philosophical foundations, for labour law. If liberal democratic values have fallen out of favour even with workers, there is no point in arguing that the employment relation somehow fails to conform to higher order democratic norms.
- Second, legal strategies built on supposed constitutional protection for basic labour rights will need to be re-engineered. The judges who proclaimed as sacrosanct the rights to organize, bargain collectively and strike are retiring; given who is appointing them, the next generation of judges is likely to begin

with the opposite assumption: that labour rights should be limited or abolished. And in fact, aggressive litigation and legislation strategies by anti-labour forces in the US are gradually stripping away rights workers have enjoyed for decades.

- Third, liberal democracy has kept labour law on life support. So long as unions could influence the outcome of elections, workers were assured some degree of consideration in any calculus of the general welfare, some immunity from extreme forms of coercion by the state, and — however imperfectly — access to an array of legal protections. In the US, at least, labour's electoral leverage has virtually disappeared since *Citizens United* — and we can expect to see a corresponding weakening of its ability to influence legislation and public policy.
- Fourth, we have to revise our general map of politics in light of the new demographic alignment. Whereas progressive movements could once appeal to workers' class identity, today right wing populist movements successfully appeal to workers on the basis of other identities: culture, race, region or nationality. So I ask: who will fight for the welfare state, for progressive taxation, for public regulation of corporate power if workers do not do so?

A little historical context may be helpful here. This is not the first time that significant numbers of workers have aligned themselves with illiberal movements, and supported reactionary domestic and foreign policies. Unions and other working class organizations have sometimes favoured close collaboration with capital, embraced xenophobia, misogyny and racism, and countenanced violations of democratic principles. Conversely, some very nasty people — from Bismark to Peron to Gadaffi to LePen to Trump — won widespread support from workers by promising to create jobs, improve working conditions and provide social goods such as pensions, education, health care and housing. In short, this is not the first time we have seen the likes of Trump and his illiberal, oligarchic and authoritarian European counterparts.

Please understand me: I am not blaming the victims. I know that workers are desperate because they have lost out in this era of technology-driven, globalized, neoliberal capitalism. I know that their sometime allies — progressive movements, intellectuals, equality-seeking communities — have not only abandoned workers but

often excoriated them. And I know that electoral democracy has been undermined by false news, voter suppression, gerrymandering and all the mischief that corporate billions can buy.

I know all that. But the fact is that significant numbers of workers in advanced democratic societies appear to have gone over to the dark side, have aligned themselves with illiberal forces and embraced undemocratic ideas or at least have ceased to care very much about the values that most of us in this room want to see at the heart of both our polity and our labour laws.

So we have a problem of cognitive dissonance. How do we justify our efforts to empower workers, to improve their lives and protect their rights, when many of those same workers support parties, personalities and policies we find repugnant? That, I argue, is the most important question labour lawyers must answer. I don't have an answer myself, but I will make some suggestions that I hope will provoke a useful discussion.

First, we have to face up to facts. The world has changed; it is likely to keep changing even more rapidly and in the wrong direction. There is no plausible scenario in which in the foreseeable future we will revive or recreate the golden age of labour law, as it was from say 1945-1970. I don't say that we should abandon what remains of traditional labour law. However, whatever energy, intelligence and political capital we invest in doing so is likely to pay very poor dividends.

Second, we have to take the long view. We must develop new labour law approaches to fit the new paradigms of work and technology, as well as the new political economy. My guess is that collective bargaining as we know it will disappear, that the new labour law will emphasize statutory standards and state regulation, rather than industrial self-government. I foresee, as well, that labour lawyers will come to accept that workers' lives can no longer be improved by providing them with the wage premium and other benefits they gained through collective bargaining in individual workplaces. They will realize — belatedly — that systemic change is needed, that workers and all of us ultimately depend on a regime of universal access to decent health care, housing,

pensions and education. In other words, labour lawyers will have to become deeply immersed in politics.

Hence the need for us, as labour lawyers, to engage in the struggle to save liberal democracy. We have two broad options. The first is to build broad electoral coalitions, involving not only what remains of the labour movement, but all progressive forces, all subaltern populations. Labour lawyers have some experience in “managing discontent”, in brokering factional disputes, in mediating amongst divergent interests. And as the Canadian experience shows, they can use their knowledge of the constitution not only to attack repressive legislation but to lay the foundation for positive measures that enhance equality, free speech and assembly and due process both in the employment relation and more generally. I acknowledge that this may seem impossibly naïve to Americans, but if you can’t rebuild your democratic institutions, labour law is finished anyway.

But coalition building is only one aspect of what labour lawyers need to do. Our other task is to provoke, or at very least to protect, militancy. Militancy can sometimes get results where conventional political action and polite policy debates do not. The New Deal experience showed us that reluctant governments, and even the “malefactors of great wealth” who controlled them, can be persuaded to make decent reforms if the alternative is the ratcheting up of civic unrest. And progressive militancy can do something else: it can counter the influence of the creepy-crawley racists and fascists who are in the end the most dangerous enemies of liberal democracy.

If I sound a little apocalyptic, it’s because I think we’re on the brink of what might well be end times for liberal democracy and for labour law. And if I’ve laid out an agenda for labour lawyers that sounds very different from what we’re used to discussing, it’s because I think that nothing less responds to the extremity of the situation. I hope you’ll convince me otherwise in our discussion.